Butler Hall Terrace Restaurant, Inc. *and* Hotel Employees and Restaurant Employees Union, Local 100, of New York, New York and Vicinity. Case 2–CA–32090

November 30, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Upon a charge and amended charges filed by the Union on March 25, April 22, and June 8, 1999, the General Counsel of the National Labor Relations Board issued a complaint on June 28, 1999, against Butler Hall Terrace Restaurant, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charges and complaint, the Respondent failed to file an answer.

On November 1, 1999, the General Counsel filed a Motion for Summary Judgment with the Board. On November 5, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated August 17, 1999, notified the Respondent that unless an answer were received by August 31, 1999, a Motion for Summary Judgment would be filed.

In addition, according to the uncontradicted allegations of the General Counsel's motion, on about September 2, 1999, the Region received a copy of its August 17, 1999 letter to the Respondent stapled to a United States Bankruptcy Court Proof of Claim form. This material had been sent to the Region by John Pereira, the trustee for the Respondent's bankrupt estate. In a subsequent telephone conversation, Pereira informed the General Counsel that the Respondent's bankruptcy proceeding, which had been a Chapter 11 proceeding, was recently converted to a Chapter 7 proceeding.[1] Pereira also told the General Counsel that he was responsible for the Respondent's estate and that he receives all mail sent to the Respondent. Pereira advised the General Counsel to file a proof of claim with the bankruptcy court. The General Counsel informed Pereira that the General Counsel would file a Motion for Summary Judgment based on the Respondent's failure to file an answer to the complaint. Pereira stated that he would not have any objection to such a motion. On about September 9, 1999, the General Counsel sent Pereira a letter confirming this telephone conversation.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New York corporation with an office and place of business at 400 West 119th Street, New York, New York, has been engaged in the operation of a restaurant. Annually, in conducting its business operations described above, the Respondent derives gross revenues in excess of $500,000, and purchases and receives at its facility goods valued in excess of $5000 directly from points located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time kitchen, dining room, and bar employees employed by the Respondent in the job classifications specifically set forth in Schedule A of the collective bargaining agreement that was in effect between the Union and the Respondent from October 1, 1988, through September 30, 1991, excluding managerial employees, clerical employees, office employees, professional employees, confidential employees, guards, supervisors as defined in the National Labor Relations Act, and all other employees.

[1] It is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers. See id., and cases cited therein.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized as such representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from October 1, 1988, through September 30, 1991, and supplemented by agreements effective from October 1, 1991, through September 30, 1995, and from October 1, 1995, through October 31, 1998. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

On January 19 and February 22, 1999, the Union, by letter, requested that the Respondent furnish the Union with the following information: a list of all bargaining unit employees, which shows each employee's name, address, telephone number, social security number, classification, date of hire, and wage rate.

With the exception of employee social security numbers, the information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the unit set forth above.[2]

Since approximately January 19, 1999, the Respondent has failed and refused to furnish the Union with the information requested by it.

On January 11 and 19 and February 22, 1999, the Union, by letters from its president, Henry Tamarin, requested that the Respondent meet and bargain collectively with the Union, as the exclusive collective-bargaining representative of the unit, for a successor collective-bargaining agreement to replace the one that expired on October 31, 1998. In late January 1999, the Union, by Tamarin, repeated the aforementioned bargaining request.

Since approximately January 11, 1999, the Respondent has failed and refused to bargain with the Union for a successor collective-bargaining agreement.

The most recent collective-bargaining agreement between the Union and the Respondent requires the Respondent to make monetary contributions to the Union's Welfare Fund and the Union's Pension Fund by no later than the 15th day of each month for the preceding month for each day the employees in the unit receive, earn, or accrue pay.

Since approximately December 15, 1998, the Respondent has failed and refused to make payments to the Welfare Fund and the Pension Fund, as required by the collective-bargaining agreement. These subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order the Respondent to recognize and bargain with the Union as the exclusive representative of the unit employees concerning a successor collective-bargaining agreement to replace the contract that expired on October 31, 1998. We also shall order the Respondent to supply the Union with unit employees' names, addresses, telephone numbers, job classifications, dates of hire, and wage rates.

Further, we shall order the Respondent to make the contractually required contributions to the Union's Welfare Fund and the Union's Pension Fund on behalf of the unit employees. In addition, we shall order the Respondent to make its unit employees whole by making all contractually required contributions to the funds that it failed to make since about December 15, 1998, including any additional amounts applicable to such delinquent payments as determined pursuant to *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). The Respondent also shall reimburse unit employees for any expenses ensuing from the Respondent's failure to make such required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), and shall make them whole for any losses attributable to the Respondent's failure to abide by the terms of the collective-bargaining agreement, such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

[2] The Board has held that social security numbers are not presumptively relevant. Accordingly, in the absence of a showing here of their potential or probable relevance, we dismiss the allegation concerning the failure to provide social security numbers. See *American Gem Sprinkler Co.*, 316 NLRB 102, 104 fn. 7 (1995); *Turner-Brooks of Ohio*, 310 NLRB 856, 857 fn. 1 (1993); and *Sea-Jet Trucking Corp.*, 304 NLRB 67 (1991).

[3] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delin-

ORDER

The National Labor Relations Board orders that the Respondent, Butler Hall Terrace Restaurant, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Hotel Employees and Restaurant Employees Union, Local 100, of New York, New York and Vicinity, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time kitchen, dining room, and bar employees employed by the Respondent in the job classifications specifically set forth in Schedule A of the collective bargaining agreement that was in effect between the Union and the Respondent from October 1, 1988, through September 30, 1991, excluding managerial employees, clerical employees, office employees, professional employees, confidential employees, guards, supervisors as defined in the National Labor Relations Act, and all other employees.

(b) Failing to furnish the Union with information that is relevant and necessary to its role as the exclusive collective-bargaining representative of the unit employees.

(c) Failing to make contributions to the Union Welfare Fund and the Union Pension Fund on behalf of the unit employees as required by the Respondent's most recent collective-bargaining agreement with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Furnish the Union with the names, addresses, telephone numbers, job classifications, dates of hire, and wage rates of all unit employees.

(c) Make all delinquent contributions to the Union Welfare Fund and the Union Pension Fund required by the collective-bargaining agreement, and reimburse the funds for its failure to do so since about December 15, 1998, as set forth in the remedy section of this decision.

(d) Make whole the unit employees, by reimbursing them for any expenses ensuing from its failure to make the required contributions to the Union Welfare Fund and the Union Pension Fund, and for any losses attributable to the Respondent's failure to abide by the terms of the collective-bargaining agreement, as set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 1998.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 1999

Sarah M. Fox, Member

Wilma B. Liebman, Member

Peter J. Hurtgen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

quent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with Hotel Employees and Restaurant Employees Union, Local 100, of New York, New York and Vicinity, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time kitchen, dining room, and bar employees employed by us in the job classifications specifically set forth in Schedule A of the collective bargaining agreement that was in effect between the Union and us from October 1, 1988, through September 30, 1991, excluding managerial employees, clerical employees, office employees, professional employees, confidential employees, guards, supervisors as defined in the National Labor Relations Act, and all other employees.

WE WILL NOT fail to furnish the Union with information that is relevant and necessary to its role as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT fail to make contributions to the Union Welfare Fund and the Union Pension Fund on behalf of the unit employees as required by our most recent collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL furnish the Union with the names, addresses, telephone numbers, job classifications, dates of hire, and wage rates of all unit employees.

WE WILL make all delinquent contributions to the Union Welfare Fund and the Union Pension Fund required by the collective-bargaining agreement, and reimburse the Funds for our failure to do so since about December 15, 1998.

WE WILL make whole the unit employees, by reimbursing them for any expenses ensuing from our failure to make the required contributions to the Union Welfare Fund and the Union Pension Fund, and for any losses attributable to our failure to abide by the terms of the collective-bargaining agreement, with interest.

BUTLER HALL TERRACE RESTAURANT, INC.